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Voluntary Peer Review of Competition Law and Policy:

Seychelles

Overview

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Note

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This Voluntary Peer Review of Competition Law and Policy has been prepared in response to the request of the Intergovernmental Group of Experts as stated in the Report of the Intergovernmental Group of Experts on Competition Law and Policy on its thirteenth session (TD/B/C.I/CLP/25). The opinions expressed in this Voluntary Peer Review are those of the peer reviewers and do not necessarily reflect the views of the United Nations Secretariat.

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This review was prepared for UNCTAD by Alex Kububa and Carl Buik. The substantive backstopping and review of the document was the responsibility of Hassan Qaqaya. UNCTAD would like to acknowledge the valuable assistance provided by George Tirant, Chief Executive Officer of the Fair Trading Commission of Seychelles. UNCTAD would also like to acknowledge the commissioners and staff of the Commission who contributed during the preparation of this report.

Preface[1]

1. This Voluntary Peer Review of Competition Law and Policy is an independent review of the competition and consumer protection legislation of Seychelles, based on extensive research and a fact-finding and stakeholder-consultation visit to the State. Research included the review of competition and consumer protection legislation and related policy documents. During the fact-finding visit, which took place from 8–12 October 2012, a total of 50 individuals from 17 organizations were interviewed.[2]

I. Socioeconomic background

2. Seychelles, which gained independence from the United Kingdom of Great Britain and Northern Ireland in 1976, consists of an archipelago of about 115 islands in the Indian Ocean northeast of the island of Madagascar off the coast of the African continent.

3. Historically, the economy of Seychelles was based on plantations, with cinnamon, vanilla and copra as the chief exports. Following the opening of the international airport on the island of Mahé in 1971, tourism became the dominant industry. The Government of Seychelles has recently moved to reduce the dependence on tourism by promoting the development of farming, fishing and small-scale manufacturing. Despite attempts to improve its agricultural base and emphasize locally manufactured products and indigenous materials, Seychelles continues to import 90 per cent of what it consumes.[3] In an attempt to reduce this vulnerability, in the mid-1980s approximately 30 parastatal companies were created, covering all sectors of the economy. State-owned and parastatal enterprises have come to account for more than half of the State's gross domestic product and two thirds of formal employment.[4]

4. The dissolution of the Seychelles Marketing Board, a government parastatal that used to operate all the major supermarkets and was the distributor and licenser of most other imports,[5] was initiated in 2006 as a result of the liberalization of domestic trade under the International Monetary Fund enhanced structural adjustment facility. As noted by the Director General of the Trade Division of the Ministry of Finance, Trade and Investment during the visit to Seychelles, this dissolution was one of the triggers for the establishment of a competition authority to regulate competition among privatized companies.

5. The executive summary of the Seychelles Government Strategy 2017 document states that to achieve the doubling of the country's gross domestic product by the year

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[1] All findings detailed in this Voluntary Peer Review were current at the time of the fact-finding visit to Seychelles.

[2] The organizations consulted were the Vice-President's Office, Finance and Public Accounts Committee of the National Assembly, Ministry of Finance, Trade and Investment, Attorney General's Chambers, Supreme Court, Seychelles Chamber of Commerce and Industry, Fair Trading Commission, Seychelles Media Commission, Customs Division of the Seychelles Revenue Commission, Central Bank of Seychelles, Seychelles Investment Board, National Consumers Forum, National Bureau of Statistics, Seychelles Public Transport Corporation, Public Utilities Corporation, Seychelles Licensing Authority and the Small Enterprise Promotion Agency.

[3] Wikipedia, 2014, available at http://en.wikipedia.org/wiki/Economy_of_Seychelles (accessed 25 April 2014).

[4] United Nations Framework Convention on Climate Change, 2004, available at http://unfccc.int/resource/ccsites/seychell/backgrnd/index.htm (accessed 25 April 2014).

[5] Wikipedia, 2014, available at http://en.wikipedia.org/wiki/Economy_of_Seychelles (accessed 25 April 2014).

2017, "it is the Government's policy to create economic conditions conducive to increased wealth generation by private businesses and individuals. The Government proposes to accomplish this by curtailing its role as an economic actor and to focus instead on operating as an economic facilitator, allowing Seychellois and international business to benefit from an increasingly business-friendly economic environment, streamlined regulatory structure and capable human resource base".[6] In 2012, Seychelles prepared a new Seychelles Sustainable Development Strategy 2010–2020, and preparation of a new national development plan is ongoing.[7]

II. Current legislation on competition and consumer protection

6. The Fair Trading Commission was established under the Fair Trading Commission Act 2009 and primarily administers the Fair Competition Act 2009 and Consumer Protection Act 2010. The Commission may also enforce any written laws relating to consumer protection and fair competition, as well as other written laws that it has the jurisdiction to administer.

A. Fair Trading Commission Act

7. The preamble to the Fair Trading Commission Act states: "An Act to provide for the establishment of a Fair Trading Commission, to safeguard the interests of consumers, to monitor and investigate the conduct of business enterprises, to promote and maintain effective competition in the economy, and to provide for matters connected therewith."[8] The establishment of the Fair Trading Commission under the Act is therefore related not only to the enforcement of the State's competition law but also to consumer protection law.

B. Fair Competition Act

8. The Fair Competition Act came into operation on 5 April 2010. Similar to most other competition legislation worldwide, the Fair Competition Act covers the three major competition concerns of anti-competitive agreements of both a horizontal and vertical nature, abuse of dominance or monopolization and anti-competitive mergers.

1. Part I: Preliminary provisions

9. The preliminary provisions of the Act include the short title of the Act and its commencement date, interpretation and application. Application of the Act to commercial activities of the State only refers to markets that are open to participation by other enterprises, effectively excluding markets dominated by statutory monopolies. Seychelles still has a number of State-owned enterprises, some in monopoly positions, and this exclusion therefore exempts a large number of enterprises from application of the competition law.

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[6] Seychelles, *Strategy 2017* (2007), available at http://www.egov.sc/documents/strategy2017.pdf (accessed 25 April 2014).

[7] African Economic Outlook, 2013, available at http://www.africaneconomicoutlook.org/en/countries/east-africa/seychelles/ (accessed 25 April 2014).

[8] Seychelles, President and National Assembly, *Fair Trading Commission Act*, 2009.

2. Part II: Fair Trading Commission

10. The functions of the Commission are wide ranging and are all directed at promoting competition in the economy of the State, including investigating anti-competitive practices and preventing such practices, as well as educating consumers on their competition rights and obligations.

11. Section 4 of the Fair Competition Act assigns responsibility for administering the Act to the Commission. Section 5(1) of the Act states that the Commission shall:

> (a) Be responsible for the promotion and maintenance of fair competition;
>
> (b) Carry out on its own initiative or at the request of any person or enterprise that has an interest in a matter, such investigations in relation to the conduct of trade:
>
> (i) As will enable it to prevent the use of business practices in contravention of this Act; or
>
> (ii) As it may consider necessary or desirable in connection with any matters falling within the provisions of this Act;
>
> (c) Keep under review commercial activities to ensure that practices that may adversely or unfairly affect the interests of consumers and businesses are prevented or terminated;
>
> (d) Take such action as it considers necessary:
>
> (i) To prevent the abuse of a dominant position by an enterprise;
>
> (ii) To eliminate anti-competitive practices; and
>
> (iii) To prevent or control anti-competitive mergers;
>
> (e) Make available to consumers general information with respect to their rights and obligations under this Act; and
>
> (f) Perform such other functions to give effect to this Act.[9]

3. Part III: Restrictive business practices

(a) *Prohibition of abuse of a dominant position*

12. Section 7(1) of the Act prohibits abuse of a dominant position, "if it may adversely or unfairly affect trade within Seychelles".[10] The term trade is defined in section 2 as "any trade, business, industry, profession or occupation relating to the supply or acquisition of goods or services".[11]

13. Section 7(2) of the Act states: "For the purposes of this Act, an enterprise or enterprises together hold a dominant position or a joint dominance in a market if that enterprise or enterprises together occupy such a position of economic strength as will enable them to operate in the market independently without effective competition from their clients, competitors or potential competitors."[12]

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[9] Seychelles, President and National Assembly, *Fair Competition Act*, 2009.
[10] Ibid.
[11] Ibid.
[12] Ibid.

14. Section 7(3) of the Act states:

Conduct may, in particular, constitute such an abuse if it consists in:

(a) Restricting the entry of any enterprise into that or any other market that supplies or is likely to supply a substitute for the goods or services supplied in that market;

(b) Preventing or deterring any enterprise from engaging in competitive conduct in that or any other market;

(c) Eliminating or removing any enterprise from that or any other market;

(d) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions that are excessive, unreasonable, discriminatory or predatory;

(e) Limiting production, markets or technical development to the prejudice of consumers;

(f) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(g) Making the conclusion of agreements subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements;

(h) Exclusive dealing, market restriction or tied selling.[13]

(b) Prohibition of agreements preventing, restricting or distorting competition

15. Section 11(1) of the Act provides that "agreements between enterprises, trade practices or decisions of enterprises, or undertakings or concerted practices of enterprises that have or are likely to have as their object or effect the prevention, restriction or distortion of competition within Seychelles, are prohibited unless they are excluded in accordance with the provisions of this subpart".[14]

16. Section 11(2) of the Act clarifies that the prohibition under section 11(1) applies to agreements, practices, undertakings or decisions that:

(a) Directly or indirectly fix purchase or selling prices, or determine any other trading conditions;

(b) Limit or control production, markets, technical development or investment;

(c) Provide for the artificial dividing up of markets or sources of supply;

(d) Affect tenders to be submitted in response to a request for bids, including:

(i) Not to submit a bid in response to a call or request for bids or tenders; or

(ii) As bidders they submit, in response to a call or request, bids or tenders that are arrived at by agreement between or among themselves, unless enterprises are not able to submit their bids individually;

(e) Apply dissimilar conditions to equivalent transactions with other parties engaged in the same trade, thereby placing those other parties at a competitive disadvantage; or

(f) Make the conclusion of agreements subject to acceptance by parties other than the offeror of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements.[15]

[13] Ibid.
[14] Ibid.
[15] Ibid.

17. The above provisions do not distinguish between horizontal and vertical agreements.

(c) Prohibition of resale price maintenance

18. Resale price maintenance is a form of vertical price fixing, and is per se prohibited in many countries.[16] The provisions on resale price maintenance in subpart III of the Act are comprehensive and address the necessary features and treatment of this anti-competitive practice.

(d) Mergers

19. Section 21 of the Act prohibits mergers not permitted by the Commission, and states:

> All mergers involving an enterprise that:
>
> (a) By itself controls; or
>
> (b) Together with any other enterprise with which it intends to effect the merger is likely to control,
>
> 40 per cent of a market or such other amounts as the Minister may prescribe are prohibited unless permitted by the Commission in accordance with this subpart.[17]

20. There is a convergence of views among competition analysts on the basic elements or issues that should be incorporated or addressed in any system of merger control. In this regard, the merger control provisions in subpart IV of the Act are not comprehensive, and cover only basic issues such as merger applications and notifications and guidelines for permissions for mergers.

(e) Proscribed anti-competitive business conduct

21. Proscribed anti-competitive business conduct, addressed in subpart V of the Act, includes the practices of price fixing, production limiting and bid rigging. Section 25(1) of the Act describes the following acts of price fixing:

> (a) By agreement or promise, intimidation or threat or any like means, attempt to influence an increase, the maintenance or a reduction of the price at which any other enterprise supplies or offers to supply, or advertises for goods or services; or
>
> (b) Refusal to supply goods or services to, or otherwise discriminate against any other enterprise engaged in business because of the low pricing policy of that enterprise or for any other reason.[18]

22. The above provisions are significant in that they clearly describe acts of price fixing, including boycotts by cartel members against deviating enterprises.

(f) Authorizations

23. Subpart VI of the Act provides for authorizations of anti-competitive practices. In this regard, section 28(1) and section 28(2) of the Act state:

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[16] Organization for Economic Cooperation and Development, 1993, *Glossary of Industrial Organization Economics and Competition Law*, Paris.

[17] Seychelles, President and National Assembly, *Fair Competition Act*, 2009.

[18] Ibid.

> (1) Notwithstanding this Act, an enterprise that proposes to enter into or carry out an agreement or to engage in a business practice which, in its opinion, is an agreement or practice affected or prohibited by this Act, may apply to the Commission in the prescribed form for an authorization to do so.
>
> (2) The Commission upon receipt of an application under subsection (1) may grant an authorization, where it is satisfied that the agreement or practice, as the case may be, is likely to promote the public benefit and is reasonable in the circumstances.[19]

4. Part IV: Investigations by and hearings before the Commission

24. Section 32 of the Act states that the Commission may initiate a complaint against an alleged restrictive business practice and section 33(1) provides that any person may submit to the Commission a complaint against, or information concerning, an alleged restrictive business practice. The Commission is obliged, under section 34, to investigate complaints against or allegations of restrictive business practices, as well as proposed mergers.

25. The Commission's investigative powers under section 34(2) of the Act facilitate the undertaking of dawn raids and include entering and searching premises and inspecting and removing for copying any documents.

26. Section 35(1) of the Act provides for the discontinuation of the Commission's investigations if the Commission is of the opinion that the matter being investigated does not justify further investigation. Section 35(2) states:

> Where the Commission discontinues an investigation under subsection (1), it shall:
>
> (a) Within 14 days of the discontinuation notify the parties concerned in the investigation of the discontinuation; and
>
> (b) Submit a report of the discontinuation to the Minister within three months of such discontinuation.[20]

5. Part V: Assessments of restrictive business practices

27. Section 40(1) of the Act provides that the Commission, before deciding on any remedial action to be taken regarding the adverse or unfair effects on competition of a restrictive business practice or merger, should consider any offsetting public benefits of the practice or merger. Section 40(2) states:

> A benefit shall be considered for the purposes of subsection (1) if it is shown that the effects of any absence, prevention, restriction or distortion of competition are outweighed by specific gains of:
>
> (a) The safety of goods and services;
>
> (b) The efficiency with which goods are produced, supplied or distributed or services are supplied or made available;
>
> (c) The development and use of new and improved goods and services and in means of production and distribution; or
>
> (d) The promotion of technological and economic progress,
>
> and the benefits have been or are likely to be shared by consumers and businesses in general.[21]

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[19] Ibid.
[20] Ibid.
[21] Ibid.

6. Part VI: Determinations of cases by the Commission and penalties and remedies

28. The determinations and remedies of the Commission on restrictive business practices and mergers provided for under part VI of the Act are standard, universal and of both a structural and behavioural nature.

C. Consumer Protection Act

29. The Consumer Protection Act, the national consumer protection legislation of Seychelles, was approved on 25 November 2010. The Act supersedes the 1997 Consumer Protection Act and includes all of the elements usually encompassed by national consumer protection laws.

1. Part I: Preliminary

30. Part I specifies the short title of the Act and matters related to interpretation, including definitions of key terms. Potentially problematic inconsistencies and omissions may be noted in the definitions provided in the Consumer Protection Act versus those in the Fair Competition Act.

2. Part II: Fair Trading Commission

31. As noted in paragraph 6 of this report, the Commission is responsible for administering the Fair Competition Act and its competition provisions and the Consumer Protection Act. Part II of the Consumer Protection Act delineates the consumer protection objectives of the Commission and its functions, including receiving complaints, investigating suspected contraventions, reporting and making determinations.

3. Part III: Unfair contract terms

32. Part III prohibits unfair contract terms and the provisions therein reflect the fact that in many situations, consumers' apparent choices in the market are non-existent, as they are not permitted to negotiate the terms of their contracts. While a significant proportion of unfair contracts are likely to be found in mass markets where standard form contracts are the norm, they may also be encountered wherever there is a significant power imbalance between traders and consumers, for example where there is a monopoly or oligopoly, demand is inelastic or consumers are impoverished or less well educated.

4. Part IV: Unfair trade practices

33. Sections 19–26 on disclosure and information provide that consumers should be given certain essential information about the goods and services on offer, including the price, full cost and any trade descriptions prescribed by the minister responsible for trade, so that they may make more informed purchasing decisions.

34. Sections 27–29 on fair and responsible marketing prohibit the quasi-fraudulent conducts of bait advertising and referral selling. Section 28 provides for the minister to make regulations in respect of distance selling. A review of summaries of complaints received by the Fair Trading Commission reveals that the three conducts specified have not been the subject of a single complaint.

35. The provisions on fair and honest dealing take two different approaches, but correspond to the universal core prohibitions of almost all consumer protection laws. Sections 30–32 address misleading or deceptive conduct and false representations and sections 35–37 cover the offering of gifts and prizes with the intention of not delivering, dishonest acceptance of payment and pyramid selling.

36. Section 38 on the right to choose is a detailed description of consumers' rights in the event of receipt of unsolicited goods, and includes the related processes to ensure that consumers are not obliged to pay because they have received unsolicited goods, while also providing for the basic protection of traders' legitimate rights.

5. Part V: Fair value, good quality and safety

37. Section 40 sets out mandatory standards for the performance of services. The list of requirements is adequate and uncontroversial. The remedies are limited but functional and in most cases sufficient for remedy of any defect or provision of a proportional refund. The stand-alone use of the word portion in section 40(2)(b) raises the question as to whether the Commission could advise, or the Board of Commissioners could order, a full refund in appropriate cases, for example where no service or only an inconsequential element of a contracted service is provided.

6. Part VI: Consumer safety

38. Sections 49–59 provide a comprehensive regime for establishing a general safety requirement and the means of determining the requirements in particular cases, investigating potential contraventions and resolving contraventions. While the general layout of the regime is logical, the detail in individual sections is complex, making awareness training for businesses more difficult than it might be in comparison to other parts of the Act.

7. Part VII: Industry codes

39. Section 61 institutes the basic prohibition that a participant in an industry shall not contravene an applicable industry code. Section 62 empowers the minister to prescribe and declare an industry code and make such provision as the Commission recommends fit for the registering of persons bound or otherwise affected by an industry code.

8. Part VIII: Penalties and remedies

40. Commonly accepted objectives of sanctions provided by consumer protection laws and imposed by authorities include ceasing the contravening conduct, undoing the harm as far as possible, refunding ill-gotten gains, encouraging future compliance by the contravener, encouraging market-wide compliance and punishing the contravener. Penalties, usually in the form of a fine, are the most commonly provided and imposed sanction. Section 67 sets out factors that should be considered when determining the appropriate penalty. This list is appropriate and comprehensive of relevant factors.

III. Institutional framework

A. Institutions

41. There are two main institutions provided for under the competition and consumer protection legislation of Seychelles, the Fair Trading Commission and the Appeal Tribunal.

1. Fair Trading Commission

42. The Fair Trading Commission is an autonomous statutory body established by the Fair Trading Commission Act to administer and enforce the Fair Competition Act and the Consumer Protection Act. The Commission is a quasi-judicial body, with both investigative and adjudicative functions. In practice, but not specifically provided for by either the Fair

Competition Act or the Consumer Protection Act, the Fair Trading Commission has two operating branches. The Board of Commissioners is the adjudicative branch and governing body and the Commission acts as the investigative and administrative branch.

(a) Board of Commissioners

43. The Board of Commissioners is appointed according to the terms in section 5(1) of the Fair Trading Commission Act for a three-year term of office. The statutory composition of the Board is five members and, in addition, the Chief Executive Officer of the Commission, who is an ex officio member. Section 5(2) of the Act states that appointed members of the Board should be "persons from the public and private sector appointed by virtue of their qualifications and experience in law, economics, accountancy or commerce".[22]

44. The Board acts as the strategic decision-making body for the Fair Trading Commission, making decisions on all investigations of restrictive practices under the Fair Competition Act and Consumer Protection Act, conducting hearings with the parties concerned and imposing directions or agreeing to undertakings where necessary.[23]

(b) Fair Trading Commission staff

45. The Commission is headed by the Chief Executive Officer, and consists of the following five departments:

(a) Communication and Corporate Services. The major areas of responsibility of this department are awareness of and sensitization on competition and consumer protection laws. The department also undertakes normai administrative work, such as financial and human resources management. The Consumer Affairs and Competition Departments have also been given advocacy and awareness functions.

(b) Consumer Affairs. This department enforces the Consumer Protection Act.

(c) Competition. This department enforces the Fair Competition Act and undertakes investigations based on complaints of restrictive business practices.

(d) Research and Policy. This department undertakes market studies and assists in economic analyses of competition cases. The department has designed a database on both competition and consumer cases, and is working on a comprehensive competition policy.

(e) Legal Affairs. This department is mainly a vetting department and is thereby linked to the other departments of the Commission, vetting all cases investigated by the Consumer Affairs and Competition Departments. The Legal Affairs Department also undertakes legal drafting work and is involved in drafting memorandums of understanding with other organizations.

46. The Commission is understaffed in certain areas. At the time of the fact-finding visit to Seychelles, the staff complement was only 17 members.

2. Appeal Tribunal

47. The Appeal Tribunal, established by the Fair Trading Commission Act, is a necessary institution in the enforcement of competition and consumer protection laws in

[22] Seychelles, President and National Assembly, *Fair Trading Commission Act*, 2009.

[23] Seychelles, Fair Trading Commission, 2014, see http://www.ftc.sc/index.php (accessed 25 April 2014).

Seychelles. However, at the time of the fact-finding visit, the Tribunal had still not been established. The Chief Executive Officer of the Fair Trading Commission advised that the chairperson of the Tribunal must be a senior-level lawyer and that a suitable candidate had not yet been found.

B. Budget and financial resources

48. Section 27(1) and Section 27(2) of the Fair Trading Commission Act state:

> (1) The funds of the Commission consist of:
>
> (a) Moneys appropriated by the Appropriation Act and paid to the Commission; and
>
> (b) Moneys lawfully charged by the Commission.
>
> (2) The funds of the Commission may be applied by the Commission:
>
> (a) In payment of:
>
> (i) Expenses incurred by the Commission in the performance of its functions; and
>
> (ii) Such remuneration and allowances due to the Commissioners, the staff of the Commission and any experts retained by the Commission; and
>
> (b) To create any reserves determined by the Commission.[24]

49. Section 57 of the Act also empowers the minister responsible for trade to make regulations for, inter alia, fees or charges "in connection with services given under this Act".[25] The annual budget of the Commission is less than US$1 million. The Chief Executive Officer of the Fair Trading Commission advised during the fact-finding visit that in 2012 the Commission was appropriated a sum of SR 8.05 million by the Government for its operations, and that for the 2013 financial year it had submitted a bid for SR 10 million.

C. Case handling

50. As noted during the fact-finding mission, between the commencement of operations in 2010 and October 2012, the Fair Trading Commission handled 290 cases, of which 274 were related to consumer protection and 16 to competition.

51. Competition cases handled by the Commission are divided into five categories, as shown in table 1.

[24] Seychelles, President and National Assembly, *Fair Trading Commission Act*, 2009.
[25] Ibid.

Table 1
Categories of competition cases

Category	*2010*	*2011*	*2012 (to October)*	*Total*
Abuse of a dominant position	2	0	4	6
Anti-competitive agreement	0	3	1	4
Resale price maintenance	1	0	2	3
Merger	1	0	0	1
Anti-competitive business conduct	0	0	2	2
Total	**4**	**3**	**9**	**16**

52. In 2011, the last full year, 264 consumer complaints were received. Of these 17 (6 per cent) were found not likely to involve contraventions of the Consumer Protection Act, 155 (59 per cent) were resolved to the satisfaction of the complainant, 14 (5 per cent) progressed to substantive investigations that were determined by the Board and 78 (30 per cent) were still being investigated at the end of the reporting year.

D. Relations with sector regulators

53. Seychelles has a number of sector regulators. Most were established before the Fair Trading Commission and therefore have a number of competition functions. Regulation is in such sectors as financial services (the Central Bank of Seychelles and Seychelles Investment Board), communications (Communication Division of the Department of Information Communications Technology), energy (Seychelles Energy Commission), media services (Seychelles Media Commission) and fishing (Seychelles Fishing Authority).

54. All sector regulators consulted during the fact-finding visit indicated that they have, or should have, good working relationships with the Fair Trading Commission.

55. In its September 2012 research note on the best operational framework between the Fair Trading Commission and sector regulators, the Commission observed that "the establishment of the Fair Trading Commission mandated to enforce the Competition and Consumer Protection Acts, which cover all sectors of the economy, has created some level of confusion and conflict with regard to certain sector regulators' role and mandate vis-à-vis competition and consumer related issues".[26]

56. The Consumer Protection Act has specific provisions on relationships with regulatory and other authorities, particularly in section 78(1)(b), which states that the Commission may "negotiate and enter into agreements with any regulatory authority which exercises jurisdiction over consumer matters within a particular industry or sector, so as to coordinate and harmonize the exercise of jurisdiction over such matters within that industry or sector; and to ensure the consistent application of this Act".[27]

57. The Fair Competition Act, however, does not include provisions on relations with sector regulators with competition functions. Section 6(1)(a) of the Fair Competition Act gives the Commission powers to "enter into such contracts as may be necessary or expedient for the purpose of performing its functions under this Act".[28] These provisions do

[26] Seychelles, Fair Trading Commission, *Research note: Best operational framework between the Fair Trading Commission and sector regulators* (Victoria, 2012).
[27] Seychelles, President and National Assembly, *Consumer Protection Act*, 2010.
[28] Seychelles, President and National Assembly, *Fair Competition Act*, 2009.

not, however, specifically refer to concurrent jurisdiction agreements with other sector regulators with competition functions, and also do not oblige other sector regulators to conclude such agreements with the Fair Trading Commission.

E. Strategic plan

58. The Fair Trading Commission has a three-year strategic plan to guide and lead its operations. The mission statement, vision and core values of the Commission under this plan are as follows:

(a) Mission statement. Advocate in favour of sound competition and consumer protection policies to safeguard the interests of consumers and the competition process and implement these policies through advocacy, market studies and enforcement, in partnership with all stakeholders.

(b) Vision. Championing market efficiency for consumers' socioeconomic welfare.

(c) Core values. Integrity: behaving in an ethical, legal and transparent manner; high performance and excellence: investing in continuous professional development of staff; quality service: offering people-friendly services; consumer rights advocacy: empowering consumers to exercise their rights; teamwork: working collaboratively within the Fair Trading Commission and maintaining good relations with stakeholders; and dynamism and innovativeness: responding to new challenges with creative solutions.[29]

IV. Other relevant issues

A. Human resources

59. The implementation of competition policy and law is relatively new in Seychelles, having effectively commenced only in 2009. Competition policy and law is not taught at the University of Seychelles and recruitment options for the Fair Trading Commission are therefore limited. The current staff members are adequately qualified, with certifications in relevant fields such as economics, law, management and accounting. The Fair Trading Commission also has an effective staff development programme in place.

60. With regard to consumer protection, the National Consumers Forum has been operational for over 18 years.

B. Advocacy, education and awareness

61. Advocacy and education have challenges common to both competition and consumer protection. However, there are some significant differences, which influence the strategies of the Fair Trading Commission and the content of its activities. Generally, the goals and even the elements of consumer protection law are widely accepted by stakeholders and debate is more often on case-specific details. The goals and elements of competition, however, are difficult for some stakeholders to understand, and acceptance that the competition process will have an economy-wide effect on consumer interests is not widespread. In part this is because of the political and economic history of Seychelles, but

[29] Seychelles, Fair Trading Commission. *Strategic plan: 2011–2014* (2011).

also because of the common view among stakeholders, as noted during the fact-finding visit, that Seychelles is "too small". In Seychelles, an exception to this relates to warranties.

62. The three-year strategic plan prioritizes advocacy and awareness and describes a number of related goals to be met, including:

(a) Holding fortnightly sessions with consumer groups on rights and responsibilities;

(b) Creating an action plan for sensitizing Government;

(c) Launching quarterly disseminations of information and educating citizens via mass media;

(d) Conducting workshops and seminars targeting government agencies;

(e) Holding regular meetings with sector regulators to address issues of public interest;

(f) Launching monthly tailored sessions with various business groups;

(g) Developing advocacy programmes for highly concentrated sectors;

(h) Conducting quarterly awareness sessions with government bodies, private bodies, consumers and other relevant stakeholders;

(i) Launching bi-annual alerts on policy matters for government agencies; and

(j) Launching an annual newsletter on the challenges and achievements of the Fair Trading Commission.

C. International cooperation

63. The Commission has only been operational for a few years, yet it is actively cooperating with various other competition authorities and organizations in the region and internationally, including with other national competition authorities under the Common Market for Eastern and Southern Africa, particularly through its representation on the current Board of Commissioners of the competition commission of the Common Market. The Commission also cooperates with other competition authorities under the Southern African Development Community through its participation in the Competition and Consumer Policy and Law Committee. In addition, the Commission is a member of the Southern and East African competition authority and the recently formed African Competition Forum.

V. Findings and recommendations

64. The Fair Trading Commission Act is a well drafted piece of legislation and, after review of the Act and the findings of the visit to Seychelles, relatively few proposed revisions to the Act were identified. The Fair Competition Act is comprehensive and contains all the basic elements of competition law. However, the arrangement of its various provisions on restrictive business practices is not well coordinated.

65. The Consumer Protection Act is a comprehensive consumer protection law that includes provisions in respect of each of the major areas expected of modern consumer law. The most significant deficiency identified is the lack of clarity in the term commission. Given the distinct functions and activities of the two branches of the Fair Trading Commission, the use of the generic term commission does not adequately distinguish

between the determinative body referred to in the Act as the Board of Commissioners and the administrative and investigative body of the Commission.

66. Another significant observation is that there is no articulated consumer protection policy. The absence of a policy has not prevented the Fair Trading Commission and a number of other regulators from actively undertaking their consumer protection functions. However, in the absence of a policy, it is more likely that the various stakeholders will pursue their own agendas without regard to the functions and activities of fellow regulators.

67. In the absence of a policy, it is also more likely that consumer protection will be seen as simply the resolving of individual consumer problems, rather than as a significant building block of national development in the way that competition law has been recognized. While some informal liaison between a number of regulators does occur, as noted during the fact-finding visit, these efforts need to be expanded. This is particularly important in a small economy where there must be less tolerance for duplication of effort or inefficient enforcement.

68. The Fair Trading Commission is a new agency with modest resources. On the basis of interviews with stakeholders, commissioners, the Chief Executive Officer and staff members, it is apparent that the Fair Trading Commission is a well led regulatory agency that is functioning satisfactorily. With one exception, no concerns were identified in the institutional arrangements, processes and procedures.

69. The major institutional failing identified is the non-existence of the Appeal Tribunal. The immediate effect of the Appeal Tribunal not having been established is that if a party is dissatisfied with a determination of the Board, it may lodge an appeal, but that appeal cannot be heard. A party that wishes to nullify the Board's determination on a matter may do so therefore simply by lodging an appeal, knowing that it cannot be heard. This potential tends to bring the entire process into disrepute and may contribute to the view that the Fair Trading Commission and Consumer Protection Act have no substantive authority. In the long term, lack of a Tribunal denies testing of the Board's determinations and the establishment of precedent.

70. Tables 2–5 detail specific recommendations on competition, consumer protection, the Fair Trading Commission and other relevant matters.

Table 2
Recommendations on competition matters

Topic	*Recommendation*	*Directed to*
Revision of Fair Competition Act	The term merger in the Fair Competition Act should be expanded to include all the three types of mergers, horizontal, vertical and conglomerate, and other business combinations. Common competition terms such as assets, confidential information, dominant position, essential facility, excessive price, horizontal agreement, negative clearance, regulator, undertaking and vertical agreement should be defined in the Fair Competition Act. The definition of the term goods in the Fair Competition Act should be aligned with that in the Consumer Protection Act. The definition of the term service in the Fair Competition Act should be aligned with that in the Consumer Protection Act, but with the inclusion of the word financial.	Legislature

Topic	*Recommendation*	*Directed to*
	In order not to exempt a large number of enterprises in monopoly positions from application of the competition law, section 3(2) of the Fair Competition Act should be amended by removing the phrase "which is open to participation by other enterprises" from the end of the section.	
	In order not to rule out Fair Trading Commission investigations based on anonymous complaints or from informers, section 5(1) of the Fair Competition Act should be amended by removing the phrase "that has an interest in a matter" from section (1)(b).	
	The Fair Competition Act should provide under section 7(2) a dominance threshold based on market shares, and the utility of the 40 per cent market share threshold currently used by the Commission as an administrative guideline should be assessed with a view to formalizing it in the Act.	Legislature, on technical advice of the Fair Trading Commission
	Certain abuses that are widespread in Seychelles, such as denial of access to essential facilities, should be added to the list of conduct that constitutes abuse by firms in dominant positions, in section 7(3) of the Fair Competition Act.	
	The provisions in section 11 of the Fair Competition Act on anti-competitive agreements should deal separately with horizontal and vertical agreements. Under horizontal agreements, there should be a clear distinction between hard-core cartels, which should be per se prohibited, and other agreements, for which there should be an indication that they will be considered using the rule of reason approach.	
	The merger control provisions in the Fair Competition Act should cover all basic elements or issues of merger control. In particular, provision should be made for size-of-the-transaction merger notification thresholds, i.e. based on merging parties' annual sales or turnover, total assets or both and the charging of merger notification fees.	
	Per se prohibited anti-competitive agreements and practices should not be subject to authorization under the Fair Competition Act, and the term "public benefit" referred to in section 28(2) should be clearly defined.	
	The provision in section 35(2)(b) of the Fair Competition Act stating that if the Commission discontinues an investigation it should submit a report to the minister responsible for trade should be removed, as it limits the Commission's independence and reduces its decision-making autonomy.	Ministry of Finance, Trade and Investment

Topic	*Recommendation*	*Directed to*
Increasing Fair Trading Commission staff capacity	The Competition Department of the Fair Trading Commission should have a mixture of economists and lawyers as case officers, and the immediate recruitment of an economist and a lawyer should be considered.	Fair Trading Commission
Comprehensive competition policy	The Commission requires local, regional and international technical assistance in drafting a comprehensive competition policy, as the process requires extensive research on current national, regional and international economic and legal environments.	UNCTAD

Table 3
Recommendations on consumer protection matters

Topic	*Recommendation*	*Directed to*
Consumer protection policy	A comprehensive consumer protection policy should be developed in consultation with stakeholders and published.	Government
Aiding and abetting contraventions	Aiding or abetting a contravention of the Consumer Protection Act and the Fair Competition Act should be added as a new offence.	
Product safety	The Consumer Protection Act should be amended to include a reference to consumer safety in the objectives listed in section 3.	
Refunds for contravention of Part V provisions	Section 40(2)(b) of the Consumer Protection Act should be amended to read: "Refund to the consumer a reasonable portion or the whole of the price paid for the service performed and goods supplied, having regard to the extent of the failure".	
Product safety	Section 50(4)(a) and section 50(5)(b) of the Consumer Protection Act should be repealed to simplify the section and increase product safety. Section 50(4)(a) of the Consumer Protection Act should be amended to replace the words "that the person reasonably believed that the goods would not be used or consumed in Seychelles" with wording along the following lines: "if the person could not have known nor found out through reasonable enquiry that the goods failed to comply with the general safety requirement".	
Efficient and effective compliance	The Fair Trading Commission should explicitly adopt the concept of the pyramid of enforcement responses and continue its current practice of attempting to resolve most complaints through negotiations and warnings. In addition, the Commission should use more serious contraventions or contraventions by repeat offenders, to test the limits of the law with a view to increasing the likelihood that more low-level contraventions will be resolved quickly and at low cost.	Fair Trading Commission

Topic	*Recommendation*	*Directed to*
Unfair contract terms	The Commission should publish a guideline explaining the provisions on unfair contract terms.	
Business access to information	The Commission website should include a page either listing any applicable trade descriptions prescribed by the minister responsible for trade and the relevant expiry dates or providing links to other government websites where such information may be obtained.	
More effective monitoring by and involvement of National Consumers Forum	The Commission should consider potentially enlisting the cooperation of the National Consumers Forum in an ongoing monitoring programme focused on the display of expiry dates and failure to label in an appropriate language or provide receipts, with a view to contributing to enforcement actions of the Commission.	
Respective roles of Fair Trading Commission and Board	Discontinuance reporting should be one of the issues considered when clarifying the respective roles of the Commission and Board of Commissioners.	Government and Fair Trading Commission
Penalties and their application	Maximum fines should be increased to a level at which they provide the Board with penalty options that will act as a significant deterrent to the worst contraventions and reflect the quite significant financial incentives sometimes linked to unlawful conduct in a commercial environment. Section 67 of the Consumer Protection Act should be amended to read: "67(1) Where the Commission determines after a formal hearing that a person has contravened any requirement or prohibition contained in sections the Commission may order the person: (a) In the case of an individual, to pay a penalty of a sum not exceeding SR 1 million; or (b) In the case of a person other than an individual, to pay a penalty of a sum not exceeding SR 4 million. (2) Where a body corporate is found to be in breach of this Act, any director or officer of the body corporate who knowingly authorized, permitted or acquiesced in the act or omission that constituted the breach shall also be liable to a penalty of a sum not exceeding SR 1 million." The Commission should routinely consider each of the factors in section 67 and any other factors it considers relevant when imposing sanctions, and its reasoning should be referred to in its written determinations.	
Sanctions and remedies	Consideration should be given to amending the Consumer Protection Act to provide a wider range of sanctions and remedies and the Board should consider the expanded use of section 68(b) where appropriate.	

Topic	*Recommendation*	*Directed to*
Potential new and temporary role for Fair Trading Commission	Consideration should be given to amending the Consumer Protection Act to grant the Fair Trading Commission specific powers in relation to business pricing conduct during the phase-in period of the new tax regime, together with appropriate funding.	
National Consumers Forum	The concept of providing for a designated super complainant and the practicality of designating the National Consumers Forum as a super complainant should be explored.	

Table 4
Recommendations on Fair Trading Commission matters

Topic	*Recommendation*	*Directed to*
Revision of Fair Trading Commission Act	Section 32(2) of the Fair Trading Commission Act, which states that the Fair Trading Commission may decide not to investigate a competition complaint against an enterprise where the complainant subsequently obtains reasonable redress, should be removed.	Legislature
	Section 39(2) of the Fair Trading Commission Act should be amended to entitle respondents and other interested parties in a competition or consumer protection case to be heard at Commission hearings along with the complainant. Fines provided for under the Fair Trading Commission Act for breaches of the Act should be raised to a more deterrent level.	
	The Fair Trading Commission Act should clearly separate, with well-defined responsibilities and spheres of operation, the investigative and adjudicative functions of the Commission, with the Commission formally responsible for statutory investigative functions and the Board of Commissioners for adjudicative functions.	
	In order to ease quorum problems on the Board, membership should be increased from five to eight members, and members should be drawn from diverse economic backgrounds in order to avoid one sector dominating membership. The terms of office should also be increased to five years, to enable the members to fully contribute to the operations of the Commission, with sufficiently accumulated experience as competition and consumer protection adjudicators. The terms of the members should be staggered, in order to avoid a sudden and complete departure of experience and knowledge.	Ministry of Finance, Trade and Investment
	Section 5(1) of the Fair Trading Commission Act providing for ex officio membership of the Chief Executive Officer of the Commission on the Board should be removed, in order to avoid conflicts of interest in the	Ministry of Finance, Trade and Investment

Topic	*Recommendation*	*Directed to*
	Board's determination of competition and consumer protection cases. Alternatively, a separate Board may be established, without the Chief Executive Officer As a member, to only consider and adjudicate on competition and consumer protection cases. The Commission should be given statutory supremacy over competition matters in Seychelles. Sector regulators with competition functions should be obliged by statute to negotiate and conclude concurrent jurisdiction agreements with the Commission on the promotion of competition in their respective sectors.	and Legislature
Remuneration of Commissioners	In addition to a fixed monthly fee, members of the Board should also be paid sitting fees for attending and participating at Commission meetings, including hearings.	Ministry of Finance, Trade and Investment
Building and increasing capacity of Fair Trading Commission officials	Vacant posts in the Commission, particularly that of Director of the Legal Affairs Department, should be filled as a matter of urgency.	Fair Trading Commission
	The Board should be given capacity-building and technical assistance in the highly specialized area of competition and consumer protection adjudication, including the provision of an expert consultant for a period of three to six months to assist in the training of Board members and implementation of the required changes in the Board's procedures.	UNCTAD

Table 5
Recommendations on other relevant matters

Topic	*Recommendation*	*Directed to*
Appeal Tribunal	The Appeal Tribunal provided for in the Fair Trading Commission Act, Fair Competition Act and Consumer Protection Act should be established without further delay.	Ministry of Finance, Trade and Investment
Advocacy and awareness	In order to increase its visibility, the Fair Trading Commission should undertake more advocacy and awareness activities, aimed at ministries, the legislature and the judiciary, as well as business and consumer associations.	Fair Trading Commission
Increasing capacity of Fair Trading Commission officials	The Commission should continue to cooperate with other competition and consumer protection authorities in the regions of the Common Market for Eastern and Southern Africa and Southern African Development Community, particularly with regard to the use of and contribution to the Southern African Development Community online resource database on competition and consumer protection cases.	

Topic	*Recommendation*	*Directed to*
	The Commission should increase its level of participation in the programmes of relevant international organizations, such as the International Competition Network, International Consumer Protection and Enforcement Network, Organization for Economic Cooperation and Development and UNCTAD. The Commission will not only benefit from international best practices but will receive direct notification of the organizations' programmes, including conferences and workshops.	